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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 Philong Huynh,

12 Petitioner,

13 v.

14 J. Lizarraga,

15 Respondent.
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Case No.: 15-cv-01924-BTM-AGS

**ORDER DENYING PLAINTIFF'S
DISCOVERY MOTION [Doc. 65]
AND REQUIRING PLAINTIFF TO
SHOW CAUSE**

17 Petitioner Philong Huynh's motion for discovery and appointed counsel (ECF
18 No. 65) is **DENIED** without prejudice because his habeas petition appears untimely.

19 Under the Antiterrorism and Effective Death Penalty Act of 1996, a state prisoner
20 has one year to file a federal habeas petition starting from "the date on which the judgment
21 became final by the conclusion of direct review. . . ." 28 U.S.C. § 2244(d)(1)(A). On
22 October 7, 2014,¹ exactly one year after direct review concluded, Huynh timely filed his
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25 ¹ Under the prison mailbox rule, a self-represented prisoner's appeal is considered
26 "filed at the time [the inmate] delivered it to the prison authorities for forwarding to the
27 court clerk." *Houston v. Lack*, 487 U.S. 266, 276 (1988). Although it was file-stamped a
28 week later, Huynh's petition was mailed or handed to prison officials on October 7, 2014.
Petition for Writ of Habeas Corpus at 11, *Huynh v. Lizarraga*, Civil No.
14-cv-2452-BEN-RBB (S.D. Cal. Oct. 14, 2014), ECF No. 1.

1 first petition. *See Huynh v. California*, 134 S.Ct. 278 (2013) (certiorari petition denied on
2 October 7, 2013); (ECF No. 12-6) (same).

3 The Court ultimately dismissed his case for failure to exhaust state remedies but
4 granted leave to amend until March 6, 2015. Order at 3, *Huynh v. Lizarraga*, Civil No.
5 14-cv-2452-BEN-RBB (S.D. Cal. Jan. 14, 2015), ECF No. 7. Huynh never filed an
6 amended petition, so that original litigation was terminated on March 6, 2015. *Id.* at 3.

7 Almost six months after his amendment deadline—on August 31, 2015²—Huynh
8 filed this new habeas petition. (ECF No. 1, at 1.) The Court previously warned Huynh that
9 if he failed to amend and instead filed a new petition, the federal limitations period could
10 continue to run. Order at 2-3, *Huynh*, Civil No. 14-cv-2452-BEN-RBB (S.D. Cal. Jan. 14,
11 2015), ECF No. 7. Now Huynh is well past the one-year habeas filing period. And “the
12 filing of the second habeas petition, following dismissal without prejudice of the first
13 petition,” does not “relate[] back to the date of the first petition.” *Henry v. Lungren*, 164
14 F.3d 1240, 1241 (9th Cir. 1999).

15 Although Huynh’s habeas claims appear to be time-barred, it is possible he has a
16 basis to avoid default, such as a state habeas petition that tolled the limitations period.
17 28 U.S.C. § 2244(d)(2) (“The time during which a properly filed application for State post-
18 conviction or other collateral review with respect to the pertinent judgment or claim is
19 pending shall not be counted toward any period of limitation. . . .”).

20 Thus, the Court **ORDERS** Huynh to show cause by **June 27, 2017**, why his petition
21 should not be dismissed as untimely. Respondent must file any response by **July 11, 2017**.

22 Dated: May 31, 2017

23 
24 Hon. Andrew G. Schopler
25 United States Magistrate Judge

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27 ² Although the new petition was apparently signed on August 24, 2015, and mailed
28 on August 28, 2015, it does not indicate the date that it was given to prison officials. (ECF
No. 1, at 11-12, 14.) It was filed in our Court on August 31, 2015. (ECF No. 1, at 1.)